Petition

81-1984
No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARC A. ROSENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was the conduct of the Government so outrageous as to constitute a violation of due process of law so as to bar the Petitioner's conviction?

2. When governmental participation in the criminal design obfuscates whether it was Petitioner's criminal intent or the Governments's activities itself which was the *sine qua non* for the commission of the offense, is entrapment or violation of due process safeguards and protections established as a matter of law to bar Petitioner's conviction?

3. When the Government utilizes a dangerous, unsupervised agent to bring forth specified ends by unknown means, is the issue of law for consideration by the Court entrapment or due process of law? Is the concept of entrapment within the umbrella of due process of law?

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Opinion Below

The Court of Appeals affirmed the judgment of the United States District Court for the Eastern District of New York on February 26, 1982, by an order which contained the following statement:

> "N.B. Since this does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other Court".

The Order of the Court of Appeals filed February 26, 1982, is reprinted at Pet. App. A, infra, p. 12.

Jurisdiction

The judgment of the Court of Appeals was entered on February 26, 1982 (Pet. App. A, infra, p. 12).

The jurisdiction of this Court in invoked under Title 28, United States Code, Section 1254 (1) and Rule 38 (b) of the Federal Rules of Criminal Procedure.

Statement of the Case

The Petitioner, Marc A. Rosenberg, was charged in a two count indictment with having conspired to violate *Title 18, United States Code, Section 201 (a)* in violation of *Title 18, United States Code, Section 371,* and having violated *Title 18, United States Code, Section 201 (a).*

The Petitioner was convicted after a jury trial in the United States District Court for the Eastern District of New York of having violated both the conspiracy and substantive counts in the indictment. Judgment of the United States District Court for the Eastern District of New York (The Honorable Eugene H. Nickerson) was rendered on August 7, 1981.

The Petitioner was sentenced to eighteen months in prison on counts one and two of the indictment to be served concurrently. The Petitioner is now serving his sentence in the Federal Penitentiary at Allenwood, Pennsylvania.

In substance, the Petitioner was charged with conspiring to bribe Richard Annicharico, a Special Agent of the Internal Revenue Service, assigned to the Brooklyn Strike Force, who was acting in an undercover roll as a corrupt Government Agent, to prevent his being indicted for perjury by the Nassau County District Attorney's Office and of actually bribing Richard Annicharico to use his influence to prevent said indictment.

The facts in substance show that the Petitioner was a practicing attorney of Jewish heritage. That he represented various individuals who were under investigation for various alleged criminal activities. Among these individuals were Andrew Russo and Carmine Persico, Jr., as well as other clients. Victor Puglisi, knew Andrew Russo, Carmine Persico, Jr. and other clients and non clients of the Petitioner. He also knew the Petitioner having been introduced by the Petitioner's father, Harry Rosenberg, Esq; a practicing attorney who died on July 2, 1978. The Petitioner took over his father's law practice upon his death.

In June, 1977, Richard Annicharico, who was employed by the United States Treasury Department, Internal Revenue Service, as a Special Agent with the Criminal Investigation Division, assigned to the Brooklyn Strike Force of the Department of Justice, volunteered to pose as a corrupt agent who would fix cases and investigations for a fee. In this undercover capacity he entered into a business relationship with Victor Puglisi, a known criminal. The business relationship was that Puglisi would make it known that he had a friend in government who could and would for a fee kill pending criminal investigations. Richard Annicharico would supply Puglisi with documents including secret grand jury transcripts to establish his credibility so that Puglisi could solicit "customers". He advised Puglisi of the contents of the Petitioner's grand jury testimony before the Nassau County State Grand Jury investigating Andrew Russo. Puglisi used this information to convince the Petitioner not to return to the Nassau County Grand Jury in an attempt to clarify his prior Grand Jury testimony. When Puglisi would be paid to have a pending investigation killed, he would share the money with Richard Annicharico. Thus, Puglisi was working on a contingent fee arrangement with Agent Annicharico. He only got paid if he convinced someone to use the services of Richard Annicharico. The

government offered evidence during the trial that during 1977 and 1978, Puglisi had been paid money to kill a State and Federal Internal Revenue investigation of Andrew Russo and to faciliate a favorable decision on a *Title 28, United States Code Section 2225* motion made on behalf of Carmine Persico Jr. by the Petitioner, Marc Rosenberg. During this period of time, Puglisi and Annicharico were working on many cases. The "business" was Puglisi's main means of support. Annicharico and Puglisi had an arrangement that should any "fix" fall through, they would repay the money they were paid. Annicharico used this "obligation" to return fees should a "fix" fall through as one of the means to motivate Puglisi to induce the Petitioner to make the telephone calls to Annicharico which were made on March 30, 1978 and April 14, 1978. In 1977, the Petitioner had testified before the Nassau County Grand Jury that was conducting an investigation of Andrew Russo's State taxes. Sometime around March 16, 1978, Richard Shanley, an Assistant District Attorney in Nassau County and former Strike Force Attorney who had taken over the Russo investigation in Nassau County, prepared a proposed indictment of the Petitioner which alleged in substance that Rosenberg had committed perjury during his grand jury testimony. On March 17, 1978, one Peter Newman, an attorney who was co-counsel with Rosenberg on the Russo case appeared before the Nassau Couty grand jury and saw the proposed indictment of Rosengerg. Newman called Rosenberg that day and told him of the proposed indictment. Rosenberg telephoned Richard Shanley and told him he had documentation that would substantiate his testimony before the Grand Jury and that he wanted to immediately return to the Grand Jury and present his documentation. Richard Shanley gave Rosenberg a hard time and it wasn't until March 22, 1978, that Shanley and Rosenberg agreed that Rosenberg could present his documents to Shanley. On March 23, Rosenberg agreed to meet with Shanley on March 29, 1978 at 2:00 P.M. to show

him his documentation. However, on March 18, 1978, Puglisi and Annicharico had a conversation about the fact that Rosenberg was about to be indicted. Puglisi asked Annicharico to fix the case against Rosenberg. Annicharico told Puglisi that Rosenberg better not appear before the Nassau County Grand Jury with his documents.

Annicharico told Puglisi in February, 1978, that if Rosenberg is subpoenaed to appear before the Nassau County Grand Jury investigating Russo, he better be sent to Florida so as not to appear. Puglisi had made his anti-semitic feelings and fears known to Annicharico. Puglisi told Annicharico that "Jews are the biggest fucking informants and when the chips are down they run like bastards. Some good people I know throughout the years got it because of Jews". Between March 22, 1978, and March 29, 1978, Annicharico appealed to all of Puglisi's fears and prejudices to keep Rosenberg from meeting with Richard Shanley or appearing before the Nassau County Grand Jury. On March 22, 1978, Annicharico agreed with Puglisi that if Rosenberg is indicted it could open up other cases he is working on with Puglisi. On that same day, Puglisi told Annicharico that Nassau County wants to grant Rosenberg immunity. Annicharico used this fact to cause more fear in Puglisi and told Puglisi "I want it stopped before it starts". On March 24, 1978, Annicharico agreed with Puglisi that if Rosenberg appears before the Nassau County Grand Jury "It could open up a can of worms". Annicharico agreed with Puglisi that Rosenberg should not be allowed to appear before the Nassau County Grand Jury. Annicharico told Puglisi that Rosenberg should be stopped from appearing before the Nassau County Grand Jury or Richard Shanley. Annicharico went to the extreme extent of causing Puglisi to believe that the Nassau County District Attorney's Office wanted Rosenberg to "Flip", turn informant. Annicharico had led Puglisi to believe that Rosenberg was aware of the criminal enterprise in which they were engaged and

played upon Puglisi's fears and prejudices that Jews were informers when under pressure so that Puglisi would induce the Petitioner to speak to Annicharico rather than return to the Grand Jury. Annicharico used Puglisi's anti-semitic prejudices in such a manner that Puglisi became concerned that Petitioner would inform about his criminal business enterprise with Annicharico if he returned to the Nassau County Grand Jury, particularly under the protection of a grant of immunity.

Annicharico induced Puglisi, a totally unsupervised government agent, a criminal and anti-semite to stop Rosenberg from seeking legal means of preventing his indictment. Annicharico could have caused the murder by Puglisi of Rosenberg. Rosenberg testified that Puglisi threatened his life if he were to continue with his quest to return to Richard Shanley or the Grand Jury to present his documentation. Puglisi was a fugitive at the time of the Rosenberg trial.

The record on appeal in the Second Circuit vividly paints a picture of Annicharico's manipulation of Puglisi to cause Rosenberg not to return to Richard Shanley or the Nassau County Grand Jury. The conduct of Annicharico was outrageous and could have resulted in the death of Rosenberg. Fortunately, it resulted only in Rosenberg failing to meet with Richard Shanley on March 29, 1978 and thereafter, speaking to Richard Annicharico on March 30, 1978, and April 14, 1978. During the March 30, 1978, conversation, Annicharico testified that it was unclear whether Rosenberg wanted his case fixed although Annicharico used strong negative inducements to get Rosenberg to approve Annicharico fixing the case. Annicharico testified that in spite of this he told Puglisi that he fixed the case and that Rosenberg better call him back or the criminal enterprise between Annicharico and Puglisi might be jeopardized. Again, Annicharico induced Puglisi through fear and greed to have Rosenberg speak to Annicharico so that they could be sure Rosenberg

wouldn't do or say anything to implicate Puglisi and Annicharico in a criminal enterprise. Again, Annicharico did not know how Puglisi, a totally unsupervised and dangerous criminal and government agent would achieve this goal.

Rosenberg testified that Puglisi achieved the call of April 14, 1978, through a death threat. The government offered no evidence to the contrary.

Puglisi was totally unsupervised by the Government. His conversations with Petitioner were not monitored. Puglisi was not instructed on what means he could or could not use to induce Rosenberg to speak to Richard Annicharico.

Reason for Granting the Writ

The law to be presented for review will assert that the concept of entrapment was meant to actuate the Government's need to show a lack of due process infringements to sustain defendant's conviction.

Recent cases have shown the obfuscation of the entrapment concept as intended by this court's original decision in *Sorrells* v. *United States,* 297 U.S. 435 (1932). In *United States* v. *Myers,* Docket No. CR. 80-249 (E.D.N.Y., filed July 24, 1981) (Pratt, J.), the trial judge in the major ABSCAM case stated as follows in his decision denying defendant's due process and other post-trial motions:

> "Entrapment is a difficult, conceptually slippery, and philosophically controversial concept. Ever since *Sorrells* v. *United States,* 287 U.S. 435 (1932), the Supreme Court has divided sharply on the standards to be applied in reviewing the conviction of a person whose criminal conduct was in part facilitated by the government agents".

The *Myers* court, relying on the sharply divided and multifacted decision in *Hampton* v. *United States*, 425 U.S. 484, 96 S. Ct. 1646 (1976), this court's most recent major expression on the entrapment defense, found no sufficient basis to disturb the jury's determination that the defendants were predisposed to commit the crime and further determined that the only matter for its consideration was whether the Government's conduct reached a demonstratable level of outrageousness to invoke due process as a bar to defendant's convictions.

This result was as a consequence of the rule left by *Hampton;* that proof of predisposition of the defendant to commit the crime will bar application of the entrapment defense and fundamental fairness and due process will bar conviction of a crime only where the police conduct was "outrageous".

It is critical for the court during the year that *Sorrells* suffers its fiftieth anniversary of confusion as to what entrapment is and what it means "to achieve clarity in thought, because confused and inadequate analysis is too apt gradually to lead to a course of decision that diverge from the true ends to be preserved." *Sherman* v. *United States,* 365, U.S. at 379; 78 S. Ct. at 824, (Frankfurter J. concurring).

Succinctly put, the outright frustration with the concept of entrapment and the essential element of predisposition was stated by the court in *United States* v. *Reynoso-Ulloa,* 548 F. 2d 1329, 1335-36 (9th Cir. 1977):

> "While it is clear that the essential element of an entrapment defense is lack of predisposition to commit a criminal act, the precise meaning of 'predisposition' is not so apparent. * * *
>
> "*Sorrells* and *Sherman* reveal a number of factors which must be considered in determining whether the defendant was a person 'otherwise innocent' in whom

> the government implanted the criminal design. Among these are the character or reputation of the defendant, including any prior criminal record; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated government inducement or persuasion; and the nature of the inducement or persuasion provided by the government. While none of the factors alone indicates either the presence or absence of predisposition, the most important factor, as revealed by the Supreme Court and other decisions, is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated government inducement."

It is apparent that in these critical times of heightened government participation in criminal enterprises that this court clarify and articulate the parameters of the entrapment defense. The facts in the case brought for review cry for articulation of the foundation for the defense as set forth originally by this court in *Sorrells* v. *United States.*

The defendant in *Sorrells* would most likely today be found predisposed to commit the crime and convicted under the present confused state of understanding concerning the defense. In *Sorrells* the government agent came to defendant's home and told defendant he was a tourist and further advised him that they had been in the same Army Division during World War I. Defendant with several of his friends and the agent sat and spoke about their war experiences. The agent asked twice for some liquor. The defendant resisted. On the third request the defendant brought him a half gallon of *whiskey.* The government agent testified that defendant left his home and in a "few minutes" came back with a half gallon of liquor for which the defendant was paid $5.00. The defense witnesses

testified that an interval of "twenty to thirty minutes" elapsed before defendant returned with the whiskey.

The thrust of the decision in *Sorrells* was that the defendant's actions were in consequence of the sentiment aroused by the government agent's reminiscences of their experiences in World War I. Specifically, this court stated that the agent" . . . succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War"; 287 U.S. at 441. Consequently, the central issue in *Sorrells* was that the moving force behind defendant's criminal conduct in *Sorrells* could have been and most reasonably considered was as a result of the sentiment aroused by the government agent's conduct. This court characterized such conduct as "a gross abuse of authority" given enforcement officials, and further stated that such conduct "deserved the severest condemnation". Unfortunately, the *Sorrells* court did not employ due process language in formulating its decision at that time.

In *Sherman* v. *United States*, 365 U.S. 369, the court was faced with a defendant who not only responded to the plotted pleas of a government agent for help and assistance in his plight, but also evidenced no connection with the contraband trade which was the subject of the underlying criminal prosecution. As a result of the facts in *Sherman* and the indication in this Court's opinion that defendant's lack of predisposition was the proof of the government agent's wrongdoing, the importance of the element of predisposition was overly emphasized and the concept of due process and essential fairness was totally obfuscated by the time this court rendered its decision in *United States* v. *Russell*, 411 U.S. 423, 93 S. Ct. 1637 (1973).

The common line running in the *Sorrells* and *Sherman* decisions was that the defendants' charged criminal activities and actions could have very well been *as a result of*

the government agent's actions and activities, and neither court could clearly say that in either case it was defendant's criminal intent that was the nexus to his commission to the crime. Once the defendant's criminal intent is obfuscated by the Government's own activities it would be essentially unfair to say that defendant's criminal intent was present or activated the criminal conduct in issue.

Conclusion

It would be appropriate for the Court to grant review of this case to delineate and articulate on the marked facts of the case, the parameters of entrapment, and its intertwinement with the constitutional safeguard and protection of due process of law. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 20, 1982

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of February, One Thousand Nine Hundred and Eighty-two.

Present:

HON. STERRY R. WATERMAN, *Circuit Judge*
HON. LEONARD P. MOORE, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*

UNITED STATES COURT OF APPEALS
Second Circuit

Filed
FEB 26 1982
A Daniel Fusaro, Clerk

ORDER
81-1319

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARC A. ROSENBERG,

Defendant-Appellant.

After a jury trial before Judge Nickerson in the United States District Court for the Eastern District of New

York, Marc Rosenberg was convicted of bribery and conspiracy to commit bribery. We now affirm that conviction.

Rosenberg was the attorney for one Andrew Russo, whose New York State income tax returns were being investigated by a Nassau County Grand Jury. The jurors suspected that Russo had purchased an expensive sport car which was registered in Rosenberg's name. However, Rosenberg testified before the jury that he had purchased the car for himself at a cost of less than $3,000.

In the meantime, Russo was attempting, through bribery of an I.R.S. agent named Richard Annicharico, to bring his tax investigation to a halt. Victor Puglisi acted as the go-between in this attempted fix. Unbeknownst to Russo and Puglisi, Annicharico was acting as an undercover agent for the I.R.S. and the Organized Crime Strike Force for the Eastern District of New York.

By March 1978, the Nassau County District Attorney's Office was convinced that Rosenberg had lied to the Grand Jury about the sport car. On March 17, Assistant District Attorney Richard Shanley prepared a proposed indictment charging Rosenberg with perjury and took it with him to the County Courthouse in Mineola. Russo's accountant, while waiting to testify before the Grand Jury, saw the proposed indictment lying on a desk and promptly called Rosenberg to tell him about it. Rosenberg's efforts to avoid indictment led him also through Puglisi to Annicharico.

Annicharico indicated to Puglisi his willingness to work on Rosenberg's behalf but insisted upon talking directly with Rosenberg so that they could get their stories straight. Puglisi arranged for Rosenberg to place a telephone call from a public telephone to Puglisi and Annicharico who would be waiting at another public telephone. Two such calls took place, one initiated by Rosenberg and the other by Annicharico. Viewing the testimony concerning these

calls in the light most favorable to the Government, it was amply sufficient to support the jury's finding of guilt. Annicharico's efforts on behalf of both Russo and Rosenberg were discussed, and the jury was entitled to find that Rosenberg approved of the efforts he thought were being made on his behalf and would see that Annicharico was paid for those efforts.

Appellant's principal contention on appeal is that he was entrapped as a matter of law. We believe, as did the district court, that the issue was for the jury. The jury could well find that Rosenberg knew that his client Russo had arranged to bribe Annicharico and it was this knowledge that led Rosenberg to the same man. Rosenberg's insistence upon talking with Annicharico over public telephones indicates that Rosenberg knowingly and intentionally planned to discuss some wrongful or illegal undertaking. The conversation recorded by Annicharico, in which Rosenberg admitted that he wanted Annicharico to "kill" the investigation and stated "very good" and "good" when told "it's all cool" and "the case is you know killed" gives little evidence of a man committing unlawful acts he was not predisposed to commit. *See United States* v. *Rosner*, 485 F. 2d 1213, 1222-23 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Greenberg*, 444 F. 2d 369 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971).

Appellant's prolix claims of due process violations do not merit extended discussion. Appellant's contention that the District Attorney's proposed indictment of him for perjury was merely a sham to set him up for the bribery charge was rejected by Judge Nickerson in a written memorandum dated July 9, 1981. We agree with both the disposition and the reasoning of Judge Nickerson. We find no merit in appellant's contention that he was wrongfully coerced and dissuaded from reappearing before the Grand Jury or that he was misled as to the strength of the Government's case against him.

Appendix

We find no prejudicial error in the evidentiary rulings of the district court. Many of the evidentiary matters now complained of were introduced into the case by the defendant himself. Others were properly inquired into for the purpose of proving knowledge, motive, and predisposition. *United States* v. *Reed,* 639 F. 2d 896, 906-07 (2d Cir. 1981); *United States* v. *Benedetto,* 571 F. 2d 1246 (2d Cir. 1978); *United States* v. *Bradwell,* 388 F. 2d 619 (2d Cir.), *cert. denied,* 393 U.S. 867 (1968).

Other contentions of appellant are not of sufficient substance to merit comment. The judgment appealed from is affirmed.

/s/ STERRY R. WATERMAN
Hon. Sterry R. Waterman

/s/ LEONARD P. MOORE
Hon. Leonard P. Moore

/s/ ELLSWORTH A. VAN GRAAFEILAND
Hon. Ellsworth A. Van Graafeiland